APPEAL NO. 111881
FILED FEBRUARY 21, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing (CCH) was held on October 31, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the compensable injury of [date of injury], extends to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte but not protrusions at C3, C4, C5, and C6; and that the respondent/cross-appellant's (claimant) impairment rating (IR) is 15%. We note that the hearing officer made a typographical error in her decision and order when identifying the date of injury in the extent-of-injury issue. The correct date of injury is [date of injury], not June 9, 2009.

The appellant/cross-respondent (carrier) appealed, disputing the hearing officer's determination of the claimant's IR and the extent-of-injury determination that the compensable injury of [date of injury], extends to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte. The appeal file does not contain a response from the claimant to the carrier's appeal.

The claimant cross-appealed, disputing the hearing officer's determination that the compensable injury of [date of injury], does not extend to protrusions at C3, C4, C5, and C6. The carrier responded to the claimant's cross-appeal, urging affirmance of the extent-of-injury determination appealed by the claimant.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. S] to determine maximum medical improvement (MMI) and IR; Dr. S certified the claimant reached MMI on February 7, 2011, with a 5% IR; and [Dr. P] certified the claimant reached MMI on February 7, 2011, with a 15% IR. The benefit review conference report reflects the parties agreed the MMI date is February 7, 2011. The claimant testified that he injured himself moving an iron pipe.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to protrusions at C3, C4, C5, and C6 is supported by sufficient evidence and is affirmed.

An MRI of the claimant's lumbar spine was performed on September 28, 2010, and indicated that the claimant had disc bulges at the L1-2 level and the L5-S1 level. The MRI gave as an impression a L4-5 left lateral disc osteophyte with mild contact with the exiting left L4 nerve root. The hearing officer, in the Background Information portion of her decision, comments that the more persuasive evidence is from [Dr. Pr] who after a recitation of the mechanism of injury and treatment, concluded that the claimant's "lumbar disc herniations and symptoms arise solely and directly from his work-related incident." A review of the letter from Dr. Pr dated May 16, 2011, referenced by the hearing officer reflects Dr. Pr stated "it is impossible to comment on the potential shear forces without having observed the incident itself." Dr. Pr notes that the claimant was working full time and was asymptomatic at the time of the accident. Dr. Pr further noted the work-related injury was significant enough to warrant a trip to the emergency room with subsequent objective diagnostic testing and that the lumbar MRI performed on September 28, 2010, objectively documented lumbar disc herniations. Although he references the lumbar MRI, Dr. Pr does not specifically mention the osteophyte at the L4 level or explain how the mechanism of injury could have caused the lumbar disc bulges at the specified levels at issue. Therefore, Dr. Pr's opinion is conclusory and is not sufficient to support the hearing officer's lumbar extent-of-injury findings.

Dr. S, the designated doctor in his narrative report diagnosed the claimant with both lumbar and thoracic strains/sprains aggravating degenerative disc disease and degenerative joint disease but does not specifically mention the extent-of-injury conditions at issue or attempt to explain how the mechanism of injury could have caused the claimed conditions at issue.

A peer review report dated November 29, 2010, concluded that the cervical and lumbar MRI findings are not causally related to the work event nor did the work event result in any aggravation or acceleration of the pre-existing disease of life findings.

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision (APD) 022301, decided October 23, 2002. *See also* Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony must be based on reasonable medical probability. City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Insurance Company of North America v. Meyers, 411 S.W.2d 710, 713 (Tex. 1966).

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong

and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

As previously noted above, the causation letter from Dr. Pr relied on by the claimant, does not specifically link the disputed lumbar extent-of-injury conditions to the mechanism of injury. Given the facts of this case, the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte and render a new decision that the compensable injury of [date of injury], does not extend to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte.

MMI/IR

As previously noted, the parties stipulated that Dr. S was appointed by the Division as designated doctor for the issues of MMI and IR. At the CCH, the carrier acknowledged that it accepted cervical, thoracic and lumbar sprains/strains. Dr. S examined the claimant on February 7, 2011, and certified that the claimant reached MMI on that date (the agreed MMI date) with a 5% IR, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. S notes that the diagnoses were thoracic and lumbar sprains/strains aggravating degenerative disc disease and degenerative joint disease. Dr. S assigned a 5% IR based on Diagnosis-Related Estimates (DRE) Lumbosacral Category II: Minor Impairment. Dr. S does not comment on the impairment, if any, he would assign for the thoracic spine injury nor does he acknowledge that the claimant's compensable injury includes a cervical sprain/strain.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

The designated doctor did not consider the entire compensable injury in certifying the claimant's IR of 5%. Therefore, the hearing officer correctly found that the preponderance of the evidence is contrary to the findings of the designated doctor regarding his assignment of IR.

The only other certification in evidence is from Dr. P who identifies himself on the Report of Medical Evaluation (DWC-69) as a doctor selected by the treating doctor acting in place of the treating doctor. Dr. P certified that the claimant reached MMI on February 7, 2011 (the agreed MMI date) with a 15% IR.

Dr. P placed the claimant in DRE Cervicothoracic Category II: Minor Impairment for 5%; DRE Thoracolumbar Category II: Minor Impairment for 5%; and DRE Lumbosacral Category II: Minor Impairment for 5%. Dr. P noted that the claimant had intermittent or continuous muscle guarding observed by a physician which provided for the impairments assigned. Dr. P then combined the 5% impairment assessed for the cervical, thoracic, and lumbar to arrive at the 15% whole person impairment assessed.

28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the [AMA Guides].

The narrative from Dr. P which accompanied the DWC-69 does not document clinical findings from an examination performed to assess impairment. Rather, the narrative simply contains a history and notes some of the records reviewed and then assesses impairment. The narrative does not contain any clinical findings of a physical examination. The narrative is dated March 7, 2011, but the DWC-69 notes the date of examination as February 7, 2011, the same date the claimant was evaluated by the designated doctor. Because the narrative report from Dr. P does not comply with Rule 130.1(c)(3), his assessment of IR cannot be adopted. No other certification is in evidence.

Because there is no report in evidence which can be adopted, we reverse the hearing officer's determination that the claimant's IR is 15% and remand the IR issue to the hearing officer for further consideration and action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor. On remand the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor, and if so, request that Dr. S rate the entire compensable injury (cervical, thoracic, and lumbar sprain/strain as previously noted was accepted by the carrier, but not lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte or protrusions at C3, C4, C5, and C6) in accordance with the AMA Guides based on the claimant's condition as of the MMI date, February 7, 2011, considering the medical record, the certifying examination and the rating criteria in the AMA Guides.

The hearing officer is to provide the designated doctor's report to the parties, allow the parties an opportunity to respond and to present further evidence, and then determine the claimant's IR consistent with this opinion.

If Dr. S is no longer qualified or available or refuses to rate the compensable injury as accepted as well as administratively determined in accordance with AMA Guides criteria, then another designated doctor is to be appointed to determine the claimant's IR. If a new designated doctor is appointed he or she is to be advised that the date of MMI is February 7, 2011, and that the doctor is to rate the entire compensable injury as previously noted according to the AMA Guides as of the date of MMI. Rule 130.1(c)(3). The parties are to be advised of the designated doctor's appointment and to be allowed to comment and present evidence regarding the designated doctor's report.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to protrusions at C3, C4, C5, and C6.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte and render a new decision that the compensable injury of [date of injury], does not extend to lumbar disc bulges at L1-2, L5-S1, and L4-5 osteophyte.

We reverse the hearing officer's determination that the claimant's IR is 15% and remand the issue IR to the hearing officer for further consideration and action consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge